IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1338

RICHARD WAYNE MUMMERT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, RICHARD WAYNE MUMMERT, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 25, 1977 and as to which a Petition for Rehearing was denied on February 21, 1978.

OPINION BELOW

On January 25, 1977, the Court of Appeals filed an opinion affirming the judgment of convictions entered in the District Court for the Southern District of California. A copy of the slip opinion which is reported at 548 F.2d 1329, is attached hereto as Appendix "A". A timely Petition for Rehearing and Suggestion for Hearing in Banc was filed on February 8, 1977. By an order dated February 21, 1978, the Petition for Rehearing was denied and the Suggestion for Hearing in Banc rejected. A copy of that order is attached hereto as Appendix "B".

JURISDICTION

The Court of Appeals affirmed the judgment of conviction and has denied a Petition for Rehearing and Suggestion for Hearing in Banc. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by Title 21, United States Code §1254(1).

QUESTION PRESENTED FOR REVIEW

Does a paid government informer inducing a theretofore legitimate business man or engage in criminal activity by the promise of a 1.2 million dollar loan, reinforced by display of official advance funds appearing to be of that amount, followed by the informant's threats of serious bodily injury or death if the deal fell through, compounded by his uncorrected perjury at trial, violate the requirements of due process or require this Court's exercise of its supervisory powers.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> ". . . nor [shall any person] be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Petitioner, Richard Wayne Mummert, forty-five years old at the time of trial, owned and operated a Ford dealership in El Cajon, California known as Marck Motors (R.T. 1600-1603, 1609, 1640, 1729). There was nothing to indicate he had ever in any way been involved in narcotic transactions, even though a thorough intelligence check was made by the DEA, including running Mummert's name through their computer (R.T. 72-74, 298, 299, 344, 376, 397, 494).[1/] The only suggestions to the contrary were some "puffing" statements petitioner made *after* he had been induced by the informant to become involved in the events which led to the conviction, and had been told by the informant: "don't act like a dummy" when meeting with the undercover agents (R.T. 1725).

Mummert was in critical need of funds for a new dealership location, which had to be built because of redevelopment in the City of El Cajon. He had made efforts to obtain financing which were unsuccessful. Preparation for building at a new location had progressed to the point of having prepared a complete mock-up. The new project required capital in the

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[1/] References to the Reporter's Transcript of the trial proceeding will be referenced ("R.T.").

amount of one million two hundred fifty-four thousand dollars ($1,254,000). The Bank of America would commit only one million ($1,000,000) (R.T. 769, 1604-1610).

It was with petitioner Mummert in that vulnerable position that the government's informant, Michael Sheen, arrived on the scene in April, 1975 (R.T. 540, 912, 1611). He had previously been a paid informant in the Pacific Northwest. After making a number of major cases, Sheen relocated to the San Diego area as a protection (R.T. 711) and not for the purpose of continuing his undercover activities (R.T. 298, 751-791). That, however, was not the course Sheen followed. He continued to stay in contact with agents in the Seattle area and indicated that he might have something for them in San Diego (R.T. 374). He worked out a "bounty" arrangement whereby he would be paid based on the number of persons he could get arrested (R.T. 267; Ex. 38A, p. 16). The more major Sheen could make the arrestee appear, the higher the payment (R.T. 273, 286, 298, 756; Ex. 40A, p. 6). Contact with the agents was predicated on alleged conversations with co-defendant Reynoso concerning narcotics. Sheen, however, had no discussions with Mummert concerning narcotics and there was nothing to indicate that Mummert was involved (R.T. 579). [See Appendix C, p. 1] Sheen's approach to getting Mummert emeshed was to tell Mummert that Sheen's father was a financier in the Pacific Northwest and funds were available to completely finance the dealership from money on which taxes had not been paid and, therefore, had to be "laundered" (R.T. 579, 712, 772, 961-964, 976, 1641-1645) [See Appendix C, pp. 2, 3]. This charade by Sheen culminated in Sheen and Mummert traveling to Seattle, Washington, where Mummert was shown what appeared to be $1,200,000 in cash

(actually $350,000 of DEA funds), which would be made available to him for buidling the new dealership. At that point, no mention had been made to Mummert concerning narcotics, and, in fact, the undercover DEA agents who displayed the "show money" had been specifically cautioned not to mention narcotics to Mummert (R.T. 83, 392, 581, 588-589, 823, 960). Sheen had been able to engineer this fiction by convincing the agents that he, Sheen, had been on a trip with Reynoso and Mummert to the Firecracker 400 Nascar race at Daytona on July 4, 1975, which included a narcotic transaction in which "millions of dollars" was passed to Reynoso in attache cases loaded with bills (R.T. 556-568, 712, 946-967; Ex. 21C, p. 46; Ex. 37A, p. 22). Based on this story (see Appendix C, p. 4) [which Sheen also related under oath to the jury at trial and which was never corrected], the DEA agents in Seattle displayed $350,000 in official advance funds to Mummert, representing the same to be, in fact, the $1,200,000 which Mummert needed for the new dealership. The "trip" to Daytona was a total fabrication by Sheen (R.T. 1205-1219, 1244, 1252-1275, 1309-1326, 1451-1452, 1630-1638). The opinion below concedes that Sheen's story about Daytona was perjured (Appendix "A", slip opinion, p. 18). Sheen was able to carry off the lie by telling the agents not to mention the Daytona trip (R.T. 273, 329; Ex. 40A, p. 27).

After the dramatic display of money in Seattle (see Appendix C, p. 4), Mummert and Sheen returned to San Diego. Shortly thereafter, Sheen put the "hook" to Mummert that there was a narcotic transaction tangentially involved in making the money available to him, and Mummert succumbed (R.T. 595, 1662-1663, 1370-1371, 1654). Petitioner thereafter became actively involved. When he had second

thoughts after delays and inability to produce (R.T. 1690, 1750) [completely consistent with the lack of not only sophistication, but any experience] the force of those second thoughts was dissapated by Sheen's threats to kill or harm Reynoso's family (R.T. 268, 320-321, 857-859, 1418, 1516, 1553-1557, 1688-1689, 1742; Ex. 39A, p. 7; see Appendix C, p. 5). The validity of those threats had been given credence by Sheen's statement that the undercover DEA agents (unknown by Mummert or Reynoso to be agents but believed to be representatives of narcotic trafficers) were holding Sheen's daughter as a hostage (R.T. 1687) in the Pacific Northwest. Reynoso had seen Sheen's daughter with the agents (R.T. 1416) and the agents had in fact transported the girl to Seattle (R.T. 393-395, 857, 1050, 1160). This unbelievable series of incidents finally culminated on September 19, 1975, when petitioner Mummert was arrested after a quantity of heroin was finally delivered to the agents (R.T. 228, 1111), some four months after Sheen's initial call to the agents (R.T. 374).

REASONS FOR GRANTING THE WRIT

1. The opinion by the Court of Appeals answers the questions specifically left open by a majority of the justices of this Court in *Hampton v. United States.*

A majority of the members of the Court (Justices Powell and Blackman concurring and Justices Brennan, Stewart and Marshall dissenting) in *Hampton v. United States,* 425 U.S. 484 (1976) specifically left open the issues which are squarely raised in the instant case. Furthermore, Justice Stevens took no part in the *Hampton* decision. That case involved a

government informant supplying the contraband on which conviction was predicated. Even though Hampton was not a stranger to the narcotics traffic, the factual situation gave serious pause to the three dissenting justices and prompted the concurring members of the Court specifically to reserve the question of how more egregious informant conduct, which petitioner submits is clearly present in the instant case, should be dealt with.

The Court is here presented with a situation in which a *de facto* government agent (by reason of his paid informant status) in effect created a criminal who previously did not exist. We have a case in which a legitimate businessman in a vulnerable financial position is enticed into criminal activity which never would have occurred and in which he never would have engaged but for the Machiavelian activities of the informant Sheen. The success of those efforts, which were to be monetarily rewarded based directly on the number of persons he could entangle and the more major the offender could be made to appear, was directly aided and assisted by official government agents making available what appeared to be $1,200,000 in cash. Furthermore, the vehicle by which Sheen was able to accomplish his objective was a fabricated story concerning a trip to Daytona when millions of dollars allegedly passed hands. The very thing, therefore, which got the official DEA agents actively involved and stimulated their enthusiasm was a total lie. When the interest of petitioner Mummert and his co-defendant Reynoso began to wain and Mummert wanted to drop the whole thing, Sheen, punctuated his efforts by threats of death or bodily injury which were interpreted as being directed toward Reynoso's family. If this case does not present the type of fact situation

which would be of concern to the concurring and dissenting justices in *Hampton*, it is difficult to conceive of a case which could frame the issues which were left open.

Petitioner is not unmindful of the necessity of using paid informants in criminal investigations, particularly involving narcotics. By its very nature, police work requires the employment of various instrumentalities. When they are dangerous, however, careful monitoring and supervision is absolutely mandated. It was totally lacking in this case. The net result was that by playing both ends against the middle, and through the exercise of nefarious ingenuity, the informant was able to destroy a previously legitimate businessman. Because of Sheen's status as a *de facto* agent of the United States Government, his activities, and that of persons similarly situated in the future must be addressed and clarified either as part of the law of entrapment, the constitutional guaranty of due process or this Court's general supervisory powers over criminal justice.

The opinion below analyzes the four major decisions of this Court in the area of entrapment, which span a period of time from 1932 to 1976: *Sorrells v. United States*, 287 U.S. 453 (1932); *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Russell*, 411 U.S. 423 (1973); and *Hampton v. United States, supra*. The conclusion is reached that the focal point with respect to entrapment is predisposition rather than the conduct of government agents (page 7, slip opinion, Appendix "A"). The decision discusses a number of factors which may be taken into account in assessing predisposition (page 10, slip opinion, Appendix "A"), and apparently concludes that the key is *manifested* reluctance (page 10, slip opinion,

Appendix "A"). That test would appear more properly to be one of evidentiary value and constitutes a significant departure from the heretofore fundamental question of predisposition.

Petitioner submits that the instant case compels an analysis which can only use the previous cases decided by this Court as points of departure. *Sorrells* and *Sherman* presented factual situations which were concededly more sympathetic to the defendants involved therein. As noted in the opinion filed below, *Sorrells* dealt with an individual who was prevailed upon because of the camaraderie that exists among persons who have previously served in the military (page 8, slip opinion, Appendix "A"). *Sherman*, it was observed (page 9, slip opinion, Appendix "A") involved capitalizing on the sympathy which an addict might have toward one representing himself as another addict in need of drugs. *Russell* and *Hampton*, on the other hand, concerned situations in which the defendants were not only disposed to engage in drug traffic but were actually so engaged and the government agents simply supplied the *sine qua non* for commission of the offenses.

The instant case presents an issue wholly different. The question is whether a government agent (informant Sheen) can go to a legitimate businessman like Richard Mummert, whom the informant knows is in financial distress, and offer a solution to all of that person's monetary problems by making immediately available a cash loan in the amount of 1.2 million dollars. Furthermore, that issue must be addressed in the context of the promise being followed by the actual display of official government funds which appeared to be

over a million dollars in cash. Petitioner submits that an offer of inducement which is for all practical purposes absolutely overwhelming must be viewed as dictating the same result as repeated and persistent importuning by a government agent (see slip opinion, page 9, Appendix "A").

Because of the combination of overwhelming economic inducement, death threats and perjury, the present petition would appear clearly to present the type of situation which concerned the concurring and dissenting members of the Court in *Hampton*. In addition, there is herein presented the question of whether in some circumstances the issue of unacceptable government conduct and the factual basis thereof might be an appropriate subject for the jury. That was, of course, touched on only briefly in *Hampton* (see: dissenting opinion of Mr. Justice Brennan at page 497). In this case petitioner specifically requested that the factual issue be presented to the jury (see, Appendix "D", p. 1).

As a corollary of the foregoing, the instant petition and the opinion below clearly point to the necessity of this Court addressing a number of the subsidiary issues which involve the law of entrapment and require direction for future cases, in addition to fashioning a proper result in the instant matter.

> "While it is clear that the essential element of an entrapment defense is lack of predisposition to commit a criminal act, the precise meaning of 'predisposition' is not so apparent." (Slip opinion, page 8, Appendix "A")

The focal point of Mummert's defense was that he was overwhelmed by the economic inducement offered by informant

Sheen. That issue was not properly framed for the jury when the trial court merely instructed as follows:

> "The terms 'inducement or persuasion,' in the law of entrapment, *MAY* include the promise of money or other economic inducement." (R.T. 2054 and 2072; emphasis supplied by the writer.)

The context of this case required one or more of the elaborating instructions on the relationship between predisposition and economic inducement (Appendix "D", pp. 2-4).

It was also critically necessary for the jury to be advised that predisposition should not be confused with making a moral assessment of petitioner Mummert. That very point was the subject of specifically requested advice to the trier of fact, but the request was rejected (Appendix "D", p. 5).

2. This Court should directly address the question of whether the government has an affirmative responsibility with respect to significant perjury committed during its case in chief.

The Court of Appeals concedes that Sheen committed perjury (page 18, slip opinion, Appendix "A"). What must be borne in mind is that his fabrication went to the whole basis on which the investigation started. The question this Court should address and on which there is non-existent direct guidance at any federal appellate level is whether a government prosecutor can ignore perjury committed during the opening case in chief by a principal prosecution witness so

long as false testimony was not knowingly presented by the government's lawyer. Compare: *Marcella v. United States*, 344 F.2d 876, 880 (9th Cir. 1965) *cert. denied* 382 U.S. 1016 (1966). The perjured testimony by Sheen did not involve some tangential matter. The trip to Daytona was the linchpin. It was the real impetus for the whole investigation. The role and duties of a federal prosecutor in that context should be specifically delineated by this Court.

INCORPORATION BY REFERENCE

Petitioner Mummert adopts and incorporates by reference all the points raised and matters submitted in support thereof by co-defendant Alfredo Reynoso-Ulloa, the petitioner in case No. 76-1466 which was consolidated with that of petitioner Mummert by the Court of Appeals.

CONCLUSION

For these reasons, petitioner Richard Wayne Mummert respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

by /s/
PETER J. HUGHES

Attorney for
Richard Wayne Mummert

Appendices

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ALFREDO REYNOSO-ULLOA, *Defendant-Appellant.*	No. 76-1466
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. RICHARD WAYNE MUMMERT, *Defendant-Appellant.*	No. 76-1500 OPINION

[January 25, 1977]

Appeal from the United States District Court
for the Southern District of California

Before: CHAMBERS and MERRILL, Circuit Judges, and JAMESON,* District Judge.

JAMESON, District Judge:

Appellants were convicted on eight counts of an indictment charging appellants and four co-defendants with distribution of heroin, possession with intent to distribute, use of the telephone to facilitate distribution, and conspiracy, in violation of 21 U.S.C. §§841, 843, 846, 952, 960 and 963. The charges arose from a conspiracy to smuggle heroin from Mexico and distribute it in the United States. Both appellants raise the issue of entrapment and the propriety of the entrapment instructions. Appellant Mummert additionally contends that alleged perjury

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

by a Government informant and prejudicial testimony given by a Government agent require reversal of his conviction.

Statement of Facts

The critical issues on appeal center on the activities of Michael Sheen, a Government informant who had previously worked for the Drug Enforcement Administration (DEA) in Seattle, Washington. Sheen had worked with DEA agents Flego and Zweiger in "making" a number of drug cases in the Seattle area. Following threats on his life, in April, 1975, Sheen moved to California where he secured a job selling cars at a Ford dealership owned by Mummert. Sheen became friendly with Mummert and through him met Reynoso-Ulloa (Reynoso), who with his brother operated a car dealership in Tijuana, Mexico.

As Sheen became better acquainted with Reynoso and their "similar interests" became apparent, they began to discuss the smuggling of heroin.[1] About mid-May, 1975, Sheen contacted agents Flego and Zweiger, informed them of Reynoso's involvement in heroin traffic, and asked them if they would be interested "in doing a large amount of heroin in the San Diego and Tijuana areas". The agents indicated their interest, and Sheen continued his heroin discussions with Reynoso.[2] Sheen told Reynoso that his father was the head of an organized crime family in Seattle which was seeking a new source of supply for narcotics. Initial negotiations were for one hundred pounds of heroin at a tentative price of $12,000 per pound. About August 3, Sheen called Flego to tell him that things were developing in the case, but that Reynoso and Mummert wanted to see if Sheen's father had the necessary $1.2 million for the deal, and that Sheen and Mummert would be flying to Seattle to view the money.

During the time Sheen was negotiating with Reynoso, he was also negotiating with Mummert, although not in relation to heroin. Mummert had been forced to relocate his car dealership and

[1]Mummert was not involved in these initial heroin discussions.

[2]Sheen thereafter maintained close contact with the agents, placing twenty-five to thirty telephone calls to them in the four-week period following the initial phone call and personally going to Seattle on several occasions. On or about June 19 agent Flego began taping most of his conversations with Sheen. These tapes were played at the trial.

needed $1,200,000 for the new facility, which he had been unable to obtain. Sheen suggested that a loan might be arranged through his father, who Sheen said was on the board of directors of a Seattle bank. Sheen told Mummert that the money was "dirty" in that no taxes had been paid on it. Mummert indicated that he could "launder" the money through Reynoso's connections in Mexico. With the view of obtaining a loan by laundering the dirty money, Mummert met Sheen and his "associates" in Seattle on August 7 and viewed the money.[3] After seeing the money, Mummert told Flego that laundering it would be no problem.

Shortly after their return from Seattle, Sheen and Mummert met with Reynoso, when Sheen mentioned the heroin deal in front of Mummert for the first time. Sheen told Mummert that the first priority for the use of the money was to purchase heroin, and that the heroin transaction had to occur before Mummert could get any money for his dealership. On cross-examination Sheen testified that Mummert indicated initial reluctance to becoming involved in the heroin transaction, saying "But I don't really want to be involved with that mess", but that later at the same meeting he agreed to participate.[4] Sheen and Mummert agreed to split ten per cent of the gross profits to be realized on the heroin transaction, which was to be invested in Mummert's dealership. A few days later, around mid-August, Sheen and Mummert were shown a sample of heroin by Reynoso in Tijuana. The following day Reynoso delivered the sample to Sheen in the presence of Mummert at Mummert's dealership.

Direct negotiations between the agents and appellants began on August 26, when Flego called and discussed with Reynoso the price, amounts, and delivery locations for kilogram quantities of heroin. During the call Reynoso admitted making prior heroin sales. In telephone conversations the following day, Flego and Reynoso agreed to meet in San Diego on August 28.

On August 28, Flego met Reynoso in San Diego and discussed with him the purchase of five to ten kilograms of heroin.

[3]The record indicates that Mummert went to Seattle to view money he thought was to be for a loan, while Reynoso thought it was to be used for the purchase of heroin.

[4]Sheen also testified that he gave Mummert "every opportunity at that point to get out of it [the heroin transaction]." [Tr. 978].

Reynoso gave Flego another sample of heroin. Reynoso told Flego that he could supply as much heroin as Flego wanted, but delivered "piecemeal" over a period of time. The meeting ended with the understanding that Flego would contact Reynoso in a few days regarding payment and the exact amount of heroin desired. Flego talked with both Reynoso and Mummert by telephone on September 2. Mummert stressed the importance of the "deal" and said it had "to happen now". [Tr. 98-100].

On September 4, Flego and Zweiger flew to San Diego to meet Reynoso, Mummert, and Sheen. Before Reynoso arrived, Zweiger met Mummert and discussed with him the purchase of ten kilograms of heroin for $400,000. Mummert told Zweiger not to worry because he could trust Reynoso, who had been in heroin trafficking for a long time and was interested in doing business with the agents because they would be steady customers.[5] Upon Reynoso's arrival, he told the agents that he could deliver five kilograms of heroin the next day for $200,000. However, problems in the delivery of the heroin developed because, Reynoso said, his most trusted "mules" had gone to Las Vegas to make a delivery.

The following day, after more delays in delivery, the agents returned to Seattle after indicating to Reynoso their dissatisfaction with his operation. During the succeeding four days Sheen was supplied with two more heroin samples by Reynoso, who explained that they would be using a temporary alternate source until their original source returned to the border.

On September 10, Sheen and Carlos Toris, named as a co-defendant, arrived in Seattle to continue negotiations with the agents. Toris stated that he could deliver multi-kilogram quantities of heroin and admitted giving Reynoso the two heroin samples furnished to Sheen. Toris agreed to "front" a kilogram of heroin to the agents at Mummert's dealership on September 15.

On September 15, Flego and Zweiger met Sheen and Mummert at Mummert's dealership. About an hour later Rolando Gonzalez arrived with a kilogram of heroin. Mummert asked Flego what

[5]The agents had told Reynoso that if the first transaction went smoothly, they wished to purchase fifty pounds of heroin a month.

he thought of the heroin.[6] Flego responded that it didn't look good since "the mule had a blender in the front seat".[7] Mummert assured Flego that it would not happen again. This meeting broke up with the understanding that the agents would return to Seattle, test the heroin, and then make arrangements for payment. On September 17, Toris called Flego and Zweiger and agreed on a price of $20,000 for the kilogram of heroin—to be paid to Reynoso.

On the afternoon of September 17, agents Flego and Zweiger returned to San Diego and again met with Mummert and Sheen. After renewing their objection to the inferior quality of the heroin, the agents were assured by Mummert that the quality would improve. Mummert explained that an organization called "Omega", consisting of organized crime figures in Mexico dealing in narcotics, was seeking to weed out small-time traffickers in order to maintain control, and that if Toris ever delivered another bad kilogram, the agents would have a chance to see Omega in action. That evening Mummert, Reynoso, Zweiger, and Flego continued to discuss future heroin deliveries. Reynoso assured the agents that Toris was only an interim source and promised them a five-kilogram heroin shipment within the next five days.

On September 19, Sheen phoned Flego that Reynoso and Mummert were ready to deliver one-and-a half kilograms of heroin. Mummert later delivered a sample and told Flego: "This is a sample of the kilo and a half you're going to get. It is better than what you bought from Toris and this is what our product is like." Shortly thereafter Reynoso arrived, and he, Mummert, Sheen, Zweiger and Flego went to a local lounge to finalize the transaction. While there, Reynoso told the agents that his people had just brought 300 pounds of morphine base from the interior of Mexico to a location outside Tijuana where it would be processed at a portable lab. The meeting ended with the agreement that Zweiger and the money[8] would stay with

[6]No money was to be paid by the agents for the heroin until they determined whether the heroin was of acceptable quality.

[7]This indicated to Flego that the mule had skimmed off some of the heroin and cut down the remainder.

[8]A purchase price of $75,000 had been agreed to, the money to be paid to Mummert.

Mummert at the dealership, while Flego, Sheen, and Reynoso went to Los Angeles to take delivery of the heroin.

During the drive to Los Angeles, Reynoso told Flego that after a few more transactions, he would give Flego a number in Los Angeles to call and as many as five kilos would be provided on a two-day notice. Upon arriving in Los Angeles, Reynoso delivered the heroin to Flego and was arrested.

Zweiger and Mummert waited at the dealership until, subsequent to Reynoso's arrest, agents arrived and arrested Mummert. While waiting, Mummert asked Zweiger if he had seen the sample of heroin which Mummert had delivered to Flego. Upon Zweiger's negative response, Mummert stated: "Well, it's not as good as some that I've seen Alfredo sell, but it's not too bad." [Tr. 1112] Mummert also elaborated on how he had become involved in the transaction. He explained that he knew Sheen had contacts interested in purchasing multi-kilogram quantities of heroin and that he knew Reynoso "had been involved in the business for a long time". Mummert said that he decided that he could finance his new dealership from profits from heroin sales if he put Sheen's customers together with Reynoso. Mummert concluded by saying that he had therefore convinced Reynoso to sell heroin to Sheen's people. [Tr. 1113]

Both appellants relied upon entrapment as a defense. Reynoso claimed that he participated in the transaction because of threats by Sheen. Mummert claimed that he was induced to participate in the heroin sales because of the large amount of money Sheen had shown him under the pretext that the money was to be a loan for Mummert's car dealership; that he lacked any predisposition to sell heroin and did so only because, after seeing the money which he needed to save his dealership, he was unable to stop himself. Mummert testified that after becoming involved he continued to participate because of threats Sheen had made against Reynoso's friends and children.

Contentions on Appeal

Reynoso contends that the court erred in instructing the jury on entrapment and that the conduct of informant Sheen was so outrageous as to deny him due process. Mummert contends that he was entrapped by Sheen, that elaborating instructions on

entrapment should have been given, that Sheen gave perjurious testimony, and that Zweiger made severely prejudicial statements in his testimony.

I. *Entrapment*

Predisposition to Commit Offense

The Supreme Court has dealt with the defense of entrapment in four major cases, each of which indicates that the focal point of the defense is the predisposition of the defendant, rather than the nature of Government conduct. In the leading case of *Sorrells v. United States,* 287 U.S. 435 (1932) the Court held that the defendant, who had sold a half-gallon of whiskey to a prohibition agent in violation of the National Prohibition Act after "repeated and persistent solicitation" by the agent, was entitled to the defense of entrapment as a matter of statutory construction. In reaching its decision, the Court noted that "[i]t is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution". 287 U.S. at 441. But while "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises", 287 U.S. at 441, the Government may not "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute". 287 U.S. at 442. The controlling question, the Court said, is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials". 287 U.S. at 451.

Sherman v. United States, 356 U.S. 369 (1958) involved the sale of narcotics to a Government agent following a number of requests by the agent predicated upon his presumed suffering from a lack of narcotics. The issue was "whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether petitioner was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade". 356 U.S. at 371. Noting that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal", the Court found that defendant had been entrapped as a matter of law, based

on the "undisputed testimony" of the prosecution's own witnesses. 356 U.S. at 373.

In an extensive exposition on the law of entrapment, the Court in *United States v. Russell*, 411 U.S. 423, 429 (1973) upheld the principles enunciated in *Sorrells* and *Sherman* and reaffirmed that the crucial element in the defense of entrapment was the defendant's predisposition to commit the crime. The Court stated that "it is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play". 411 U.S. at 436. The most recent statement by the Supreme Court on entrapment came in *Hampton v. United States*, 425 U.S. 484 (1976). The defendant was convicted on two counts of distributing heroin which he contended had been supplied to him by a Government informant. The Court, in holding that the defendant had not been subjected to police conduct so outrageous that due process would bar conviction, see *United States v. Russell, supra* at 431-432, reiterated that the defense of entrapment was predicated on the defendant's lack of predisposition. 425 U.S. at 490.

While it is clear that the essential element of an entrapment defense is lack of predisposition to commit a criminal act, the precise meaning of "predisposition" is not so apparent. We find the guidelines in *Sorrells* and *Sherman*.

In *Sorrells* the defendant was a man of reputed good character in the community. While some Government witnesses testified that he had a reputation as a rum-runner, there was no evidence that he had ever possessed or sold any intoxicating liquor prior to the transaction for which he was convicted. A prohibition agent came to defendant's home posing as a tourist who had been in the same army division as defendant during World War I. A conversation ensued among the agent, defendant and several of defendant's friends about their war experiences, during which the agent asked the defendant if he could get the agent some liquor. The defendant twice refused these requests, stating, as one witness testified, that he "did not fool with liquor", but finally acceded upon the third request by the agent and brought him a half-gallon of whiskey after an interval of "between twenty and thirty minutes". The agent testified that he was "the first and only person among those present at the time who said anything about securing some liquor" and that his purpose was to prosecute the defendant for procuring and selling it. On these facts the Supreme Court concluded:

> "It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscence of their experiences as companions in arms in the World War." 287 U.S. at 441.

Sherman involved a defendant convicted on three counts of selling narcotics to a Government informant whom he had met at a doctor's office where both apparently were being treated for drug addiction. After several meetings and conversations about their mutual problems in overcoming drug addiction, the informant asked the defendant if he knew a good source of narcotics because, the informant stated, he was not responding to treatment. Defendant tried to avoid the issue but finally acquiesced after a number of requests by the informant, predicated on his presumed suffering. Defendant thereafter obtained narcotics several times and shared them with the informant. Each time defendant bore the cost of his share of the drugs plus the expenses in obtaining them. The Supreme Court held that the defendant had been entrapped as a matter of law by the informant's resort to sympathy to induce the defendant to sell narcotics. The Court stated:

> "One request was not enough, for Kalchinian [the informant] tells us that additional ones were necessary to overcome, first, petitioner's refusal, then his evasiveness, and then his hesitancy in order to achieve capitulation. Kalchinian not only procured a source of narcotics but apparently also induced petitioner to return to the habit." 356 U.S. at 373.

Furthermore, the Court found no evidence aside from a record of defendant's past convictions, to support the Government's case: "There is no evidence that petitioner himself was in the

trade. When his apartment was searched after arrest, no narcotics were found. There is no significant evidence that petitioner even made a profit on any sale to Kalchinian." 356 U.S. at 375.

Sorrells and *Sherman* reveal a number of factors which must be considered in determining whether the defendant was a person "otherwise innocent" in whom the Government implanted the criminal design. Among these are the character or reputation of the defendant, including any prior criminal record;[9] whether the suggestion of the criminal activity was initially made by the Government;[10] whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government. While none of the factors alone indicates either the presence or absence of predisposition, the most important factor, as revealed by Supreme Court and other decisions, is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement.[11]

Mummert's Defense

The evidence is sufficient to establish Mummert's predisposition to commit the offenses for which he was convicted, when viewed in a light most favorable to the Government. Cf. *Glasser v.*

[9]It is not necessary, however, to show that the accused "had previously been convicted of or had previously committed acts similar to those for which he was being tried. This argument is specious, inasmuch as one may be predisposed to commit his first crime as much as, if not more than, a chronic offender who, theoretically, should be more fearful of the consequences". *United States v. Martinez,* 488 F.2d 1088, 1089 (9 Cir. 1973).

[10]However, this fact alone in no way indicates entrapment, since mere solicitation is not enough to show entrapment. See *Lopez v. United States,* 373 U.S. 427 (1963); *United States v. DeVore,* 423 F.2d 1069 (4 Cir. 1970), *cert. denied,* 402 U.S. 950 (1971).

[11]We have found no case in which the defense of entrapment (as opposed to cases dealing with due process principles) was successful where the defendant had not indicated reluctance to engage in illegal activity.

United States, 315 U.S. 60 (1942). Agent Zweiger testified that in his conversation with Mummert on September 19, Mummert told him that he became involved in the heroin transaction when he realized that he could finance his dealership with profits from heroin sales if he put Sheen's customers together with Reynoso. Mummert also told Zweiger that he was the person who convinced Reynoso to sell heroin to Sheen's people. This testimony was uncontroverted, even by Mummert.

In other conversations with Sheen and the agents, Mummert manifested his knowledge of smuggling heroin across the border and the quality of heroin Reynoso was capable of delivering. On one occasion, Mummert told the agents that if Toris ever again delivered inferior heroin, he would be "wasted". He discussed a previous heroin transaction in which a "mule" who had been "skimming" had been taken care of. While these statements by Mummert do not establish his involvement in previous heroin transactions, they do lead to that inference.[12]

The evidence most damaging to Mummert's entrapment defense, however, is his own testimony. He admitted that he became involved in the transaction to finance his dealership. He did not deny that he had convinced Reynoso to sell the heroin, nor did he testify that he had shown any reluctance or refusal to continue in the heroin scheme.[13] He testified that at one point, when Reynoso was reluctant to proceed with the heroin sale, he

[12]Mummert also told agents Flego and Zweiger that he was "well-connected" with organized crime in the El Cajon area. Pointing to several individuals, Mummert said: "They're your biggest competition in heroin trafficking in San Diego."

[13]"Q At that point you were in a little deeper; isn't that correct?

"A Oh, yes.

"Q Did you tell them, 'Just stop, I want to walk away from this'?

"A Well, I was told by Michael Sheen that the million two hundred thousand was in the bank with the 400,000.

"Q So you were thinking about your dealership.

"A You bet.

"Q And you didn't stop the transaction at that point.

"A No, sir." [Tr. 1738]

talked Reynoso "back into doing it again".[14] Finally, Mummert testified that he was unconcerned about his involvement with heroin: ". . . They had heroin coming in before they met me. And they're going to get it someplace, so why should I be concerned." [Tr. 1727][15]

A jury could reasonably conclude that Mummert had the necessary predisposition to sell heroin and had not been entrapped. The testimony established that Mummert showed little, if any, real resistance to participation in the heroin transaction

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[14]"Q And then the transaction continued to go forward; isn't that correct?

"A Yes, sir.

"Q And the 5th there was another meeting, right?

"A Yes, sir.

"Q Did you continue to discuss how important this heroin transaction was? Isn't that correct?

"A Absolutely. That was the only way I was going to get my dealership.

"Q The wraps were off it insofar as you were concerned, weren't they? I mean, you knew exactly what was involved; isn't that correct?

"A Yes. And I think that on the 5th was the day that I had to go down and talk Alfredo back into doing it again." [Tr. 1739]

[15]Mummert testified on this point several times:

"Q You weren't troubled a bit about the idea of heroin being connected with this transaction?

"A It never entered my mind, because they were—like I said before, they were getting it before they met me.

"Q At that point you had no conscience problems; isn't that correct?

"A Well, like I repeat again. It wasn't a case of conscience, it was a case that they had the money before they met me, they were in the heroin business before they met me, I wasn't aware of it, but—this is the way that the thing was sprung on me." [Tr. 1740]

. . .

"Q Was it your testimony that the only reason you got involved was just to develop your dealership?

"A Absolutely.

"Q And long before Richard Mummert arrived, there was heroin, and there'll be after you leave; is that correct?

"A I'm sure of that.

"Q And you just simply weren't responsible for the heroin; is that correct?

"A Correct." [Tr. 1752]

when it was revealed to him,[16] nor was he concerned about the illegal nature of that activity. In fact, rather than being a reluctant participant in the transaction, the evidence indicated that Mummert at times was the moving force behind it. Mummert convinced Reynoso to sell the heroin, persuaded Reynoso not to back out, and even made physical delivery of heroin samples. On several occasions Mummert urged the agents not to blow the "sweet deal". These actions and statements are not indicative of a person "otherwise innocent", but instead reveal an "unwary criminal" anxious to successfully conclude his criminal enterprise.

The nature of the inducement confirms this conclusion. Mummert was seeking a large sum of money for his dealership. The fact that he was willing to "launder" the untaxed money before he was told of the heroin scheme,[17] together with the other evidence, leads to the inference that Mummert was willing to do almost anything to obtain the money. The defense of entrapment, while protecting the innocent from Government creation of crime, is unavailable to a defendant who, motivated by greed and unconcerned about breaking the law, readily accepts a propitious opportunity to commit an offense. Although the Government's use of the $1.2 million does indicate a degree of

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[16]The only evidence of reluctance was Sheen's testimony that when Mummert first learned that the money for his dealership was to come from heroin sales he said: "But I don't really want to be involved with that mess." This statement was not even confirmed by Mummert. In any event, he showed no further reluctance and became an active participant in the conspiracy.

[17]"Q Yet you were concerned about acquiring this untaxed money to build the dealership.

"A I wasn't concerned about it. They had it a long time before they met me.

"Q So long as money is money, it has no odor, as the Swiss say; is that correct?

"A No, I was aware that the taxes hadn't been paid on the money.

"Q But that didn't affect you, of course.

"A No, sir.

"Q As far as you were concerned, it was money, and money was to be used.

"A Yes, sir. And it wasn't my responsibility to pay taxes." [Tr. 1726-1727]

inducement to the commission of the offense, we find sufficient evidence of Mummert's predisposition to preclude entrapment as a matter of law.

Mummert additionally argues that because Sheen was working on a contingent fee basis,[18] he was entrapped as a matter of law. He relies upon *Williamson v. United States,* 311 F.2d 441 (5 Cir. 1962), *cert. denied,* 381 U.S. 950 (1965) in which the Fifth Circuit reversed the convictions of two defendants for possession of whiskey in unstamped containers because the informant with whom they had dealt was being paid on a contingent fee basis. *Williamson* is factually distinguishable,[19] and we decline, in any case, to follow its rationale in light of *Russell* and *Hampton,* which indicate that predisposition of the defendant, rather than the conduct of the Government, is to be the focal point of an entrapment defense. Having found Mummert to be predisposed, there can be no entrapment. See *United States v. Russell, supra* at 436.

Furthermore, "[t]o sustain [appellant's] contention here would run directly contrary to [the] statement in *Russell* that the defense of entrapment is not intended 'to give the federal judiciary a "chancellor's foot" veto over law enforcement practices of which it did not approve' ". *Hampton v. United States, supra* at 490, citing *United States v. Russell, supra* at 435.[20] We conclude that Mummert was not entrapped as a matter of

[18]Sheen's fee was to depend on the size of the transaction and number of participants. He was to be paid a specific amount for each pound of heroin seized and for each "body" involved. At the time of appellants' arrest, that amount had not yet been determined.

[19]In *Williamson,* the defendant was a "specified suspect" and the informant was employed to obtain evidence against him. Here Sheen learned of Reynoso's involvement in the heroin traffic, reported to the DEA agents, and agreed to work on the case. As in the past he would be paid a contingent fee. We are not unmindful that few would engage in a dangerous enterprise of this nature without assurance of substantial remuneration.

[20]Mr. Justice Powell said in a footnote to his concurrence in *Hampton:* ". . . One cannot easily exaggerate the problems confronted by law enforcement authorities in dealing effectively with an expanding narcotics traffic, [citations omitted] which is one of the major contributing causes of escalating crime in our cities. [citations omitted] Enforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity." 425 U.S. at 495-496, n. 7.

law merely because the informant was to be paid on a contingent fee basis.

II. *Due Process*

Reynoso contends that due process requires the reversal of his conviction because of profane threats made to him by Sheen.[21] The threats were made on September 6, 1975, when Reynoso allegedly was having doubts about continuing the transaction.[22] Appellant relies upon dictum in *Russell* where the Court noted that it might "some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from involving judicial processes to obtain a conviction. . . ." 411 U.S. at 431-432.

Clearly, Reynoso cannot rely on the defense of entrapment since he does not challenge the implicit finding of his predisposition, of which there is overwhelming evidence. Neither do we find Sheen's conduct, although by no means commendable, to have been so outrageous that principles of due process require reversal of his conviction. The threat must be viewed in the context of the vulgarity and "puffing" engaged in by all participants in the transaction. It is an isolated incident in over two months of negotiations among Sheen, the agents, and appellants during which numerous false claims and veiled threats were made.[23] This

[21]The threat, in Sheen's own words, was:

> ". . . I told Alfredo, I said, you know, you mother fucker, they are making it, I'm swinging right now. I mean, you know, these people are pissed. My old man ain't too happy with this whole program and I told him, I said if I'm gonna get my ass in this much shit, I'm gonna do you cocksuckin fuckin Mexican friends, and he said okay, I don't blame you, so he said I'll put you right into it. So he did." [R.T. 320]

Testimony showed that the phrase "do you" means to kill someone. Reynoso thus contends that Sheen threatened to kill his friends unless he carried out the heroin sale.

[22]This argument is raised by Reynoso with respect to all counts with which he was charged, except Count II (delivery of one gram of heroin on August 28, 1975) which occurred before the threat.

[23]The jury had a full opportunity to consider the statement in view of all the surrounding circumstances. On cross-examination Sheen was interrogated at length with respect to this statement, and Reynoso's counsel made frequent reference to it in his closing argument.

court may judicially notice the fact that trafficking in drugs is a sordid business, and often involves persons of the lowest caliber. When viewed in this context, Sheen's threat fails to rise to the level of conduct violative of "fundamental fairness, shocking to the universal sense of justice". ***Kinsella v. United States ex rel. Singleton,*** 361 U.S. 234, 246 (1960).

III. *Instructions*

The court instructed the jury that the Government bore the burden of proving beyond a reasonable doubt that appellants were not entrapped and defined entrapment as follows:

> "Where an otherwise innocent person, with no previous intent or purpose to violate the narcotics laws, is induced or persuaded by law enforcement officers or their agents to commit a crime, he is the victim of entrapment and the law, as a matter of policy, forbids his conviction in such a case.
>
> "On the other hand, where a person already has the predisposition, that is, the readiness and willingness to break the narcotics laws, the mere fact that Government agents provided what appears to be a favorable opportunity, is not entrapment.
>
> . . .
>
> "If, then, the jury should find beyond a reasonable doubt from the evidence in this case that before anything at all occurred respecting the alleged offenses involved in this case, the defendant was ready and willing to commit the crimes as charged in the Indictment, whenever opportunity was afforded, and the Government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant was not a victim of entrapment.
>
> "On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some officer or agent of the Government, then it is your duty to acquit him.
>
> "The terms 'inducement or persuasion,' in the law of entrapment, may include the promise of money or other economic benefit.
>
> "Law enforcement officers are entitled to infiltrate groups of persons whom they know or suspect to be involved in criminal activity. There is nothing unlawful or improper in doing that. The law, however, does not permit Government agents to originate or implant the criminal design in a defendant's mind."

Appellants argue that the court should have given their proposed elaborating instructions on entrapment and that refusal to do so was reversible error. Reynoso's proposed instructions stated:

> "If looking to the totality of the circumstances of this case, you find that the conduct of government agents or those acting on their behalf was so outrageous as to be fundamentally unfair and shocking to the universal sense of justice, you must acquit the defendants and need not consider the question of predisposition."

This instruction does not state the law of entrapment as it presently exists and was properly refused. See ***Hampton v. United States, supra.***

Mummert submitted elaborating instructions on (1) economic inducement, (2) "ready and willing" predisposition, (3) caution against making a moral judgment, (4) totality of the circumstances and (5) a "but for" instruction, all of which were properly refused. The instructions offered by Mummert were either repetitious or gave inordinate emphasis to the inducement element of entrapment. The instructions given by the court properly instructed the jury on the elements of entrapment necessary to decide the case. ***Hampton v. United States, supra; United States v. Russell, supra; United States v. Griffin,*** 434 F.2d 978, 981-982 (9 Cir. 1970),[24] ***cert. denied,*** 402 U.S. 995, ***reh. denied,*** 404 U.S. 877 (1971).

IV. *Perjury*

Sheen testified that prior to the transaction involved in this case, he made trips to Charlotte, North Carolina and Daytona, Florida with Mummert to attend stock car races, and that during

[24]The court's instruction is nearly verbatim that approved in *Griffin.*

these trips drugs and money, in which Reynoso was involved, were exchanged. The trip to Charlotte was admitted, but Sheen's testimony with respect to the drug transactions was denied by Mummert and several other witnesses. Sheen testified that Reynoso also made the trip to Daytona. Mummert and Reynoso, supported by the testimony of other witnesses, denied that this trip was ever made. Mummert now contends that Sheen's testimony was perjury which was severely prejudicial.

"Before a sentence may be vacated on the ground of perjured testimony, the movant must show that the testimony was perjured and that the prosecuting officials knew at the time such testimony was used that it was perjured." *Marcella v. United States,* 344 F.2d 876, 880 (9 Cir. 1965), *cert. denied,* 382 U.S. 1016 (1966). Although the record indicates that Sheen's testimony was perjured, there is no evidence that the Government knowingly used the false testimony.

Moreover, this is not a case where the defendants learned subsequent to trial that perjured testimony had been offered by the prosecution. Here appellants' counsel knew well in advance of the trial what Sheen had told the agents and what his testimony would be with respect to the alleged trips. Appellants were fully prepared to rebut Sheen's testimony and thereby impeach his credibility. The alleged perjury was fully explored at the trial.

Under the circumstances we find no prejudice. It concerned events which occurred before any participation by Mummert in the heroin transaction. Nor was Mummert involved in the apparently fictitional drug transactions which were the subject of the false testimony. Sheen's testimony was, if anything, helpful to Mummert, since it tended to discredit Sheen and to bolster Mummert's entrapment defense. We find no reversible error.

V. *Prejudicial Statement*

Finally, Mummert contends that a statement made by agent Zweiger during direct examination was so prejudicial as to require a mistrial. Zweiger testified that Mummert, in one of their conversations, stated that he was "well-connected in the El Cajon area and in the Los Angeles area with organized crime figures". The court, prior to this testimony, had instructed Government

counsel to go over prospective testimony with its witnesses and avoid areas of possible prejudice. Government counsel stated that he had complied with the court's order, but that Zweiger's statement came as a surprise.

Rather than objecting to the testimony and requesting a cautionary instruction, counsel for Mummert waited and later moved for a mistrial. In denying the motion, the court said: ". . . it is material that tends to be prejudicial. On the other hand, I think in the context of what is now before the Court, the statement is probative. I don't think it was planned to come in, it did come in, and I deny the motion for mistrial".

Mummert contends that this evidence referred to prior conduct of Mummert which inadmissibly tended to show criminal disposition or character. See *Parker v. United States,* 400 F.2d 248, 252 (9 Cir. 1968), *cert. denied,* 393 U.S. 1097 (1969). This argument overlooks the fact that Mummert was relying on the defense of entrapment, which exposes a defendant to a "searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he [the defendant] suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense". *Sorrells v. United States, supra* at 451-452. Zweiger's testimony bore on the issue of Mummert's predisposition. Any prejudice inherent in the statement was outweighed by its relevance to that issue.

In any case, Zweiger's statement was not so prejudicial as to require a mistrial. At the time of the statement, there had been testimony that Mummert had told the agents about the functioning of Omega, a group of Mexican organized crime figures dealing in narcotics. The evidence also revealed that on one occasion Mummert, in the presence of Flego and Zweiger, had pointed to several San Diego organized crime figures and said: "They're your biggest competition in heroin trafficking in San Diego." At the time of Zweiger's testimony there was thus already evidence indicating Mummert's familiarity with organized crime. Furthermore, the testimony came as a surprise, and defense counsel failed to immediately object or to request cautionary instructions. In these circumstances we find that the testimony was not highly prejudicial. The court's refusal to declare a mistrial was a proper exercise of its discretion. See *United States v. Bergman,* 354 F.2d 931, 935 (2 Cir. 1966).

United States of America vs.

Conclusion

We conclude that (1) both appellants were predisposed to the commission of the offenses for which they were convicted and were not entrapped; (2) the conduct of informant Sheen was not so outrageous as to deny Reynoso due process of law; (3) the court properly instructed the jury on the law of entrapment; and (4) neither Sheen's allegedly perjurious testimony, nor Zweiger's voluntary testimony was so prejudicial as to require reversal. Accordingly, appellants' convictions are affirmed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee,** **vs.** **ALFRED REYNOSO-ULLOA,** **Defendant-Appellant.**	**No. 76-1466**
UNITED STATES OF AMERICA, **Plaintiff-Appellee,** **vs.** **RICHARD WAYNE MUMMERT,** **Defendant-Appellant.**	**No. 76-1500** **ORDER DENYING PETITION FOR REHEARING**

Before: CHAMBERS and MERRILL, Circuit Judges, and JAMESON, District Judge.

The panel as constituted above has voted to deny the petition for rehearing. Judges Chambers and Merrill have voted to reject the suggestion for rehearing in banc and Judge Jameson has recommended rejection of the same.

The full court has been advised of the suggestion for rehearing in banc and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing in banc is rejected.

TRIAL EVIDENCE

(Testimony of Michael Sheen)

Q. Who approached Mr. Mummert on viewing this money?

A. I did.

Q. Now, up to this point, you had't (*sic*) been talking to Mr. Mummert, had you?

A. No.

Q. You'd been talking exclusively with Alfredo Reynoso.

A. That is correct.

Q. To your knowledge, at this point, was Mr. Mummert involved?

A. Not in the heroin transactions, no.

Q. At least that was your understanding, wasn't it?

A. That's correct.

Q. What did you tell Mr. Mummert about this trip to Seattle?

A. That this was money that could be used as a loan for probably his business.

Q. And you knew Mr. Mummert, in his business enterprise, was short of capital?

A. A little, yes.

(RT 579.)

TRIAL EVIDENCE

(Testimony of Michael Sheen)

Q. Now, when you first mentioned the availability of money in the Pacific Northwest, were you the one that opened that subject so far as talking to Dick Mummert?

A. Yes, I believe so.

Q. And did you tell him that your father was on the board of directors of some bank in the Seattle area and Pacific Northwest area?

A. That's correct.

Q. And did you initially tell him that the money would be available as a loan?

A. I told him the money was available for investment purposes. That it was untaxed money that had been illegally earned.

Q. Was that in your first conversation with Dick about money being available?

A. This is when we were first laying the groundwork for him to come up, yes.

[TR 961-62.]

TRIAL EVIDENCE

(Transcript of Tape Recording of Michael Sheen)

Q. Well, Mike, when you say you conned Dick a little bit can you go into that a little bit as to . . .

A. Well, I told Dick that there were possibilities that, you know, he might be able to put enough money together and finance his new dealership.

Q. He was working for a new dealership?

A. He was looking for money for a new dealership. He has to build a new dealership.

Q. Is it because he's . . .

A. His old facility is being bought up by the city of El Cajon, and he has to build a new dealership, that's all there is.

Q. So, you told him you needed to make some money yourself and he indicated that he could make money, is that correct?

A. Well, he indicated he needed money because he wasn't able to get the full loan that he needed to build it, so I told him there were possibilities that we could work something out.

[Exhibit 21C, page 5.]

TRIAL EVIDENCE

(Testimony of Michael Sheen)

Q. Okay. Well, on – Flego asked you the question: "Have you ever seen a million dollars in cash travelling with these people," and you said "Yep," and Flego said, "Out front, a million bucks?" and you said, "That's right; more than that friend. I saw a hell of a lot more than that out front."

Now, when you told Flego that, what were you making reference to?

A. To that money aboard the plane in Daytona.

[TR 961; see also Exhibit 37A, page 22.]

(Testimony of Richard Mummert)

Q. Did it look like a million, two hundred thousand?

A. That's the most money I've ever seen in my life.

[TR 1654.]

TRIAL EVIDENCE

(Transcript of Tape Recording of Michael Sheen)

SHEEN: See, I told Alfredo, I said, you know, you mother fucker, they're making us, I'm swinging, right now. I mean you know these people are pissed – my old man ain't too happy with this whole program and I told him, I said if I'm gonna get my ass in this much shit, I'm gonna do you cock suckin' fuckin' Mexican friends, and he said okay, I don't blame you, so he said I'll put you right into it. So he did.

FLEGO: You knew your kid traveled decent.

SHEEN: Was she good?

[Exhibit 39A, page 7.]

Defense Instructions Requested and Refused

"There is another defense available to the defendants, but only if you find the facts substantiate the principle of law which I am about to give you.

"As you will recall the evidence regarding the government's participation in this case focused to a great extent on the activities of Michael Sheen who has testified here. Before you consider this defense, you, as sole judges of the facts, must determine what role Mr. Sheen played in this case.

"The evidence varies at several points, and the inferences that you may or may not draw could vary on certain points, as to what actually happened. Only you as jurors can resolve the factual disputes as to what occurred in 1975. You must determine whether these acts, as you find them, reach an intolerable degree of overreaching governmental participation.

"These activities, you must find must have been intolerable and to have gone beyond the limits of permissible law enforcement techniques I have discussed in giving you the charge of entrapment.

"That is to say, if you find that the overreaching participation by government agents or informers in the activities as you have heard them here was so fundamentally unfair as to be offensive to the basic standards of decency, and shocking to the universal sense of justice, then you must acquit any defendant to whom this defense applies.

"Futhermore, under this particular defense, you need not consider the predisposition of any defendant; because if the governmental activities reached the point that I have just defined in your own minds, then the predisposition of any defendant would not matter." Defendants' requested instruction no. 9 (CT 197-98).

"You have been instructed that the government must prove beyond a reasonable doubt that each of these defendants was predisposed to commit the acts charged, and I have defined predisposition.

"If, looking to the totality of the circumstances of this case, you find that the conduct of government agents or those acting on their behalf was so outrageous as to be fundamentally unfair and shocking to the universal sense of justice, you must acquit the defendants and need not consider the question of predisposition." Defendants' requested instruction no. 10 (CT 199).

"The defense of entrapment may be raised by evidence of economic inducement. If a defendant is lured into the commission of offenses by the promise of financial benefit, then the defense of entrapment is available to him.

"If financial reward was what caused a defendant to become involved in acts which he was not predisposed to and would not have done except for this offer of financial benefit, and that financial inducement originated with and came from Michael Sheen, then a defendant so induced cannot be held criminally liable for the offenses charged. As I noted, if there is a reasonable doubt as to whether that occurred, then a defendant is entitled to an acquittal." Defendants' requested instruction no. 3 (CT 191).

"Should you find that the defendant was in a position of economic hardship or duress; that his necessitous circumstance was known to government agents; that government agents induced defendant to participate in the illegal scheme conceived by them with promises of large profits aimed at alleviating this circumstance; and that but for this combination of events and circumstances the defendant would not have acquiesced in the illegal activity; then you must find that defendant was entrapped." Defendants' requested instruction no. 11 (CT 200).

"Promises by government agents of large profits aimed at alleviating economic hardship but for which defendant would not have engaged in the conduct charged may constitute entrapment." Defendants' requested instruction no. 12 (CT 201).

"In order for the defense of entrapment to be available to a defendant, it must be proved that he was not only willing but also ready to commit the offenses with which he is charged prior to being approached by the government's informant. Therefore, unless you find beyond a reasonable doubt that a particular defendant was not only willing to become enaged [*sic*] in narcotic transactions but was ready to do so prior to being approached by Michael Sheen, then he is entitled to an acquittal. The government must convince you that Sheen's activities were not the reason that a defendant went forward and engaged in activities which he would not have done except for the informant's activities." Defendants' requested instruction no. 6 (CT 194).

"In order for a defendant to be predisposed to commit narcotic violations within the meaning of the law of entrapment, it must be established that he was both willing and ready to commit such violations prior to being approached by the government agent Sheen." Defendants' requested instruction no. alternate 6 (CT 207).

"A person who is induced by the government to commit an offense which he would not have become involved in except for the government's activity, cannot be held responsible for his conduct, if a government agent implanted the criminal design in a defendant's mind." Defendants' instruction no. 7 (CT 195).

"One of the issues which you will be considering is whether or not a particular defendant had the predisposition to commit the offenses charged in the indictment. This does not mean that you are to make a moral judgment of a defendant, and indeed it would be improper for you to do so. You of course may consider all of the evidence in the case, but in deciding whether or not a defendant was or was not predisposed to commit the offenses charged, the issue you must decide is whether he was predisposed, that is, ready and willing, to engage in narcotic transactions before he ws approached by the informant Sheen." Defendant's requested instruction no. 8 (CT 196)

"In determining whether a defendant was or was not predisposed to commit the offenses charged in the Indictment, the question which you must consider is whether he was predisposed to commit violations of the narcotics laws. In deciding that issue, you are not to make a moral judgment of any particular defendant." Defendants' requested instruction no. alternate 8 (CT 208).

Nos. 77-1338 and 77-6384

In the Supreme Court of the United States

OCTOBER TERM, 1977

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v.

UNITED STATES OF AMERICA

ALFREDO REYNOSO-ULLOA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 548 F.2d 1329.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1977. A petition for rehearing, with suggestion for rehearing *en banc*, was denied on February 21, 1978 (Pet. App. B). The petition for a writ of certiorari in No. 77-1338 was filed on March 22, 1978, and the petition in No. 77-6384 was filed on March 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to give additional instructions on entrapment.
2. Whether the conduct of a government informant was so shocking that due process principles bar the government from prosecuting petitioners.
3. Whether perjury on the part of a government witness requires reversal of petitioner Mummert's conviction (Pet. 77-1338).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioners were convicted of five counts of distributing

[1] "Pet. App." refers to the Appendix in No. 77-1338.

heroin and one count each of possession of heroin with intent to distribute, use of a telephone to facilitate its distribution, and conspiracy, all in violation of 21 U.S.C. 841, 843, 846, 952, 960 and 963 (Pet. App. A-1). Each petitioner was sentenced to concurrent terms of four years' imprisonment on the charge of use of a telephone to facilitate distribution and to eight years' imprisonment on each of the other counts, to be followed by a three-year term of special parole. The court of appeals affirmed in a lengthy opinion (Pet. App. A-1 to A-20).

In April 1975, Michael Sheen, a government informant who had worked for the Drug Enforcement Administration (DEA) in Seattle, Washington, moved to Southern California following threats on his life (Tr. 71-72). He took a job selling cars at a Ford dealership owned by petitioner Mummert (Tr. 540). Sheen soon became friendly with Mummert and through him met petitioner Reynoso-Ulloa (Reynoso) (Tr. 541-542). As Sheen became better acquainted with Reynoso, he discovered that the latter had an interest in smuggling heroin. Sheen contacted DEA agents Flego and Zweiger, with whom he had worked in Seattle, and asked them if they would be interested in pursuing an investigation (Tr. 73). When the agents indicated their interest, Sheen pursued his negotiations with Reynoso, while maintaining regular contact with the DEA agents (Tr. 73-75, 576).

Sheen told Reynoso that he had connections with a group in Seattle that was seeking a new source of

supply for narcotics (Tr. 572-574). As negotiations developed, Sheen called Agent Flego and told him that Reynoso and Mummert were willing to make a deal if they could be convinced that Sheen's principals in Seattle had the necessary money (Tr. 75, 576-578).

Meanwhile, Sheen was independently negotiating with Mummert, who was trying to obtain $1,200,000 in order to relocate his car dealership. Sheen told Mummert that his father and his father's banking associates had untaxed, illegally earned money available for investments (Tr. 962, 963). Mummert responded that he could "launder" the money and made some preliminary arrangements to do so through Reynoso's connections in Mexico (Tr. 1644-1646). Mummert then met Sheen and the undercover agents in Seattle, where he was shown what appeared to be $1,200,000 (Tr. 79, 587, 1654). Mummert told Agent Flego that either he or Reynoso would be able to launder the money (Tr. 80).

Sheen testified that shortly after their return from Seattle, he met with petitioners Mummert and Reynoso. According to Sheen, this was the first time he had discussed the heroin transaction in Mummert's presence (Tr. 594-595). Sheen explained that the heroin transaction would provide the funds to relocate the dealership (Tr. 986). Sheen testified that Mummert indicated initially that he was reluctant to become involved with the heroin, saying he didn't "really want to be involved with that mess." (*ibid.*). Mummert subsequently agreed to participate with

the expectation that he and Sheen would use the profits from the heroin transaction to invest in Mummert's dealership (Tr. 644, 998-999). Indeed, Mummert later told undercover agent Zweiger that he had convinced Reynoso to sell heroin to Sheen's associates so that he (Mummert) could finance the dealership with his share of the profits (Tr. 1113).

Direct negotiations between the agents and both petitioners continued over several weeks; samples were exchanged, and several meetings took place (Tr. 607, 90-91, 150, 157-161, 184), but problems with Reynoso's Mexican connections caused continuing delays in delivery (Tr. 142, 143, 144, 147). Mummert periodically reassured the agents as to Reynoso's reliability and the quality of the heroin they expected to supply (Tr. 142, 161, 169, 1036, 1044, 1089). Finally, on September 19, 1975, Reynoso and Mummert were ready to deliver one and a half kilograms of heroin for $75,000 (Tr. 183-184). Reynoso was arrested when he delivered the heroin to Agent Flego in Los Angeles, and Mummert was arrested while he was waiting with Agent Zweiger and the purchase money (Tr. 192, 228).

ARGUMENT

1. Petitioners contend that the instructions on entrapment given by the district court were erroneous.

a. Petitioner Mummert contends (Pet. No. 77-1338, pp. 10-11) that the trial court erred in refusing to give one or more of the elaborating instructions

he proposed (Pet. App. D) regarding the relationship between predisposition and economic inducement, since the crux of his defense was that he had been overwhelmed by the promise of large amounts of money offered by informant Sheen.

The entrapment instruction given by the district court (Pet. App. A-16 to A-17) which tracked 1 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 13.09 (3d ed. 1977), properly presented the elements of entrapment established by this Court in *Sorrells* v. *United States*, 287 U.S. 435, and *Sherman* v. *United States*, 356 U.S. 369, and reaffirmed in *United States* v. *Russell*, 411 U.S. 423, and *Hampton* v. *United States*, 425 U.S. 484. The court charged the jury (Pet. App. A-16) that they must acquit if they had a reasonable doubt "whether the defendant had the previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some officer or agent of the Government * * *." The jury was then instructed that this persuasion or inducement could include the "promise of money or other economic benefit" (*ibid.*).

As the court of appeals correctly found, the additional instructions offered by petitioner Mummert repeated the substance of the court's charge and would have placed undue emphasis on the aspect of inducement, suggesting that the jury could ignore whether petitioner readily accepted the opportunity to break the law (Pet. App. A-17). Accordingly, the

district court did not err in refusing to give the additional instructions.

b. Both petitioners assert a kind of due process defense, based upon the statement in *United States* v. *Russell*, *supra*, 411 U.S. at 431-432, that a situation might some day arise "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction * * *." Relying on this language as well as statements in the concurring and dissenting opinions in *Hampton* v. *United States*, *supra*, petitioners claim that they were entitled to an instruction directing the jury to acquit them regardless of their criminal predisposition if the jury found the conduct of the government agents "so outrageous as to be fundamentally unfair and shocking to the universal sense of justice." (Pet. App. D-2).

Assuming that such a defense is available in a proper case, however, it would raise a question solely for the court, not the jury. When the focus is on the constitutional limit of governmental involvement in crime, "the determination of the lawfulness of the Government's conduct must be made—as it is on all questions involving the legality of law enforcement methods—by the trial judge, not the jury." *United States* v. *Russell*, 411 U.S. 423, 441 (Stewart, J., dissenting); see *Hampton* v. *United States*, 425 U.S. 484, 497 (Brennan, J., dissenting); *Sherman* v. *United States*, 356 U.S. 369, 385 (Frankfurter, J., concurring in result); *Sorrells* v. *United States*, 287

U.S. 435, 457 (separate opinion of Roberts, J.). Accordingly, the district court did not err in rejecting an instruction on that issue.

2. The court of appeals properly concluded that the facts had not established such a due process defense in the instant case.

a. The court considered and rejected petitioners' claim that profane threats Sheen made to Reynoso were so outrageous as to require reversal of their convictions (Pet. App. A-15 to A-16). As the court correctly noted, "[t]he threat must be viewed in the context of the vulgarity and 'puffing' engaged in by all participants in the transaction" (Pet. App. A-15). During the course of the negotiations, numerous false claims and exaggerated statements were made, all as part of the sordid milieu in which drug trafficking generally takes place. For example, when agents Flego and Zweiger criticized the quality of the heroin that petitioners had supplied, petitioner Mummert himself stated that his supplier would be "wasted" if he ever again delivered inferior heroin (Tr. 1099).

Furthermore, nothing in petitioners' conduct supports their contention that they gave credence to this threat and went ahead with the transaction because of it. To the contrary, Mummert himself testified that on September 5th—the day before Sheen's threat to Reynoso—he was very much interested in having the transaction completed and that he himself had convinced Reynoso to go forward with the deal (Tr. 1739-1740). On the same day, both Reynoso and Mummert urged the agents not to back out of the deal

and assured them that they would locate the heroin through different sources (Tr. 1050-1052).

b. Mummert also suggests (Pet. No. 77-1338, pp. 7, 9-10) that Sheen's offer of a loan of $1.2 million to a businessman known to be in financial distress was such an overwhelming inducement that he could not properly be convicted. This fact, however, suffices neither to make out the due process defense nor to establish entrapment as a matter of law. The court of appeals correctly rejected petitioner's contention, treating the fact that such a large sum was involved as merely one factor to be considered in determining whether Mummert had been entrapped. The court concluded from the evidence that Mummert showed "little, if any, real resistance" to becoming involved in the heroin transaction, that he was at times the moving force in the heroin scheme, that he had agreed to "launder" untaxed money even before he was told of the heroin scheme, that Mummert was unconcerned about illegality and ready to join any enterprise that would bring him a large sum of money (Pet. App. A-10 to A-13). The court concluded (Pet. App. A-13) that the jury could properly reject a defense of entrapment by such a person, "who, motivated by greed and unconcerned about breaking the law, readily accepts a propitious opportunity to commit an offense."

3. Finally, petitioner Mummert contends (Pet. No. 77-1338, pp. 11-12) that a government informant committed perjury during the government's case in chief. "[A] conviction obtained by the *knowing* use

of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103 (emphasis supplied); see *Napue* v. *Illinois*, 360 U.S. 264, 269.

Although the court below did conclude (Pet. App. A-18) that Sheen's testimony linking Reynoso with one or more drug transactions prior to the incidents involved in this case was false, it also found that there was no evidence that the government knew of this falsity. Petitioner does not challenge this finding. In any event, the record supports the court of appeals' conclusion (*ibid.*) that neither petitioner was prejudiced by the admission of Sheen's statement. To the contrary, as the court of appeals noted, since petitioners knew well in advance of trial what Sheen's testimony would be, they were able to rebut his testimony effectively and thus impeach his credibility. Certainly, the alleged perjury did not prejudice Mummert, since it related only to petitioner Reynoso's alleged prior involvement in drugs and had no bearing on Mummert's participation in the scheme in question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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